

First, the Board finds that this is an appeal from a preliminary hearing order. Accordingly, the Board must determine if there is a jurisdictional basis to review the ALJ's Order at this stage of the proceedings. K.S.A. 44-551 limits the jurisdiction of the Board. The Board has jurisdiction to review decisions from a preliminary hearing in those cases

where one of the parties has alleged the ALJ exceeded his or her jurisdiction or where one of the specific jurisdictional issues identified in K.S.A. 44-534a is raised. A contention that the ALJ has erred in his finding that the evidence showed a need for medical treatment benefits is not an argument the Board has jurisdiction to consider. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary total disability compensation. Therefore, before the Board can exercise jurisdiction on an appeal from a preliminary hearing order, there must be an allegation that the ALJ exceeded his jurisdiction in granting or denying the relief requested.<sup>1</sup>

The matter came before the ALJ upon claimant's Application for Regular Hearing. However, by entering an Order for Medical Treatment the ALJ treated the hearing as if it were a preliminary hearing pursuant to K.S.A. 44-534a. The ALJ authorized claimant's personal physician to prescribe medication to treat the effects of claimant's work-related injury and ordered respondent to pay for those services. "Medical treatment is ordered provided and paid on claimant's behalf by respondent and insurance carrier [sic] with Dr. Tim Duncan for the purpose of prescribing pain medication to relieve the effects of claimant's work related injury until further order."<sup>2</sup>

Respondent contends the ALJ exceeded his jurisdiction and authority because (1) the Order came out of a regular hearing instead of a preliminary hearing (2) respondent was not given proper notice of a preliminary hearing issue (3) although terminal dates were established, respondent was not given an opportunity to present evidence on the issue and (4) the ALJ granted relief that claimant had not requested. Conversely, claimant contends the ALJ did not exceed his jurisdiction and that the order should be affirmed.

Claimant sustained a work-related accident on July 21, 2002, when he was struck by a crane. As a result of that accident, claimant alleges he sustained injuries to both his knees. Respondent contends claimant suffered only a temporary aggravation of his preexisting degenerative condition from which claimant has recovered and, therefore, claimant's current condition is unrelated to the work-related accident. Accordingly, respondent has refused to authorize additional medical treatment.

At the regular hearing held in this proceeding on January 17, 2003, claimant testified that he asked respondent on several occasions to refer him to a physician for pain medications. Respondent refused those requests. Claimant did not make a request for an order for medical treatment during the hearing. Nevertheless, following the hearing Judge Avery issued the order which is the subject of this appeal.

---

<sup>1</sup> K.S.A. 44-551(b)(2)(A).

<sup>2</sup> Amended Order for Medical Treatment (Jan. 17, 2003).

During claimant's testimony at the January 17, 2003, hearing, the ALJ asked respondent's counsel if there was any problem appointing claimant's personal physician to prescribe pain medication. Respondent's counsel replied:

Well, no one is recommending that in terms of the doctor that I'm aware of. Today's the first time we've been told he is seeking that. Moreover, there is a dispute in the case as to whether or not the degenerative condition is causally related to this accident. Without knowing what condition the prescription medication might be deemed appropriate for, I can't make any concessions today.<sup>3</sup>

Respondent contends the Board has jurisdiction of this appeal because the ALJ's Order constituted a denial of due process. The Board agrees.

"The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."<sup>4</sup>

No particular form of proceeding is required to constitute due process in administrative proceedings; all that is required is that the liberty and property of the citizen be protected by rudimentary requirements of fair play. Its requirements include the revelation of the evidence on which a disputed order is based, an opportunity to explore that evidence, and a conclusion based on reason; and its essential requirements are met where the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made.

Whether or not a person has been deprived of due process of law by the action of an administrative agency or body depends on whether it acted contrary to the statutes and rules and with arbitrary and unreasonable discrimination. Denial of due process occurs where the exercise of power by an administrative officer or body is arbitrary or capricious, where a decision of a board or commission is based on mere guesswork as to an essential element, or where a finding is unsupported by any evidence.<sup>5</sup>

---

<sup>3</sup> R.H. Trans. at 21.

<sup>4</sup> *Collins v. Kansas Milling Co.*, 207 Kan. 617, 620, 485 P.2d 1343 (1971).

<sup>5</sup> 73 C.J.S. *Public Administrative Law and Procedure* § 59; See also *Johnston Coal & Coke Co. v. Dishong*, 198 Md. 467, Syl. ¶ 5, 84 A. 2d 847 (1951); *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 811 P.2d 876 (1991); *Peck v. University Residence Committee of Kansas State Univ.*, 248 Kan. 450, 807 P.2d 652

The Board has previously addressed the question of whether a denial of due process constitutes an ALJ exceeding his jurisdiction so as to give the Board jurisdiction to decide the case on appeal from a preliminary hearing order. In *Graham v. A+ Sweeping, Inc.*, Docket No. 206,881, 1997 WL 378652 (Kan. WCAB June 12, 1997) the Board found that an action by the ALJ which constituted a denial of due process, exceeded the ALJ's jurisdiction under K.S.A. 1997 Supp. 44-551.<sup>6</sup>

The ALJ while having the authority to decide a case incorrectly, cannot make a decision on an issue which is not before him. And to make such a decision without giving the parties notice and an opportunity to be heard and present evidence on the issue constitutes an unreasonable, arbitrary and capricious act on the ALJ's part which denies due process to the parties involved. Such an act exceeds the discretion and jurisdiction of the ALJ.

[T]he discretion vested in administrative officers and agencies is not absolute or unlimited. Administrative discretion must be exercised in accordance with the law, including applicable constitutional provisions, and those of statutes and regulation. The discretion must be exercised in accordance with the established principles of justice, and with skill, sound judgment, and probity. Their action must be both legal and reasonable, and fair toward those with whom they deal.<sup>7</sup>

Where the compensability of an injury has been established and the claimant has not reached maximum medical improvement and/or is in need of continued medical care due to his work-related injury, then K.S.A. 44-510(a) would require that reasonable medical compensation be furnished by the respondent.

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses computed in accordance with subsection (a) of

---

(1991); *Kansas Racing Management, Inc. v. Kansas Racing Comm'n*, 244 Kan. 343, 770 P.2d 423 (1989)

<sup>6</sup> See also *Church v. White Star Commercial Coating and McPherson Contractors, Inc.*, Docket No. 204,042, 1999 WL 1314831 (Kan. WCAB. Dec. 30, 1999).

<sup>7</sup> 73 C.J.S. *Public Administrative Law and Procedure* § 60.

K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

In this case, however, there is a dispute concerning the compensability of this claim and specifically with regard to the compensability of claimant's future medical treatment.

Respondent points to the language in K.S.A. 44-534a(a)(2):

"...that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the **employer** the opportunity to present evidence, including testimony, on the disputed issues." (Emphasis added.)

Although the ALJ established terminal dates at the hearing for the presentation of additional evidence by the parties, the ALJ entered the Order for Medical Treatment before the expiration of those terminal dates.

The Board finds the ALJ exceeded his jurisdiction and authority when he addressed an issue not properly noticed nor otherwise before him, i.e., the issue whether claimant should receive medical benefits before the final award. The respondent did not have an opportunity to present evidence on that issue and, therefore, the respondent was denied due process of law. The ALJ's order should be set aside.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the January 29, 2003 Amended Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery should be, and hereby is, set aside and this matter remanded to the Administrative Law Judge for further proceedings including a final determination of the claim.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ May 2003.

---

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant  
Gregory D. Worth, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge  
Director, Division of Workers Compensation